Supreme Court, U.S.
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No. 92-1273 (2)

In The

Supreme Court of the United States

October Term, 1992

SOUTHVIEW ASSOCIATES, LTD.,
SOUTHVIEW AT STRATTON PARTNERS,

Petitioners,

v.

INDIVIDUAL MEMBERS OF THE VERMONT ENVIRONMENTAL BOARD; FERDINAND BONGARTZ, LIXI FORTNA, ARTHUR GIBB, SAMUEL LLOYD, WILLIAM MARTINEZ, CHARLES STORROW, STEVE WRIGHT, and the CHAIRMAN OF THE ENVIRONMENTAL BOARD, ELIZABETH COURTNEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On October 30, 1992, the Second Circuit Court of Appeals affirmed the dismissal of the Complaint of the Petitioner, Southview Associates, Ltd. and Southview at Stratton Partners (Southview), on the grounds that Southview failed to allege a proper "takings" claim. *Southview Associates et al. v. Bongartz et al.*, 980 F.2d 84 (2d Cir. 1992) (Oakes, C.J.).

REASONS FOR DENYING THE PETITION FOR CERTIORARI

1. The Respondents have not deprived Southview of any fundamental right.

2. The Respondents have not engaged in the "physical occupation" of Southview's property; rather, this matter involves a "regulatory" taking claim which is not ripe for review.

3. The State of Vermont provides an adequate method by which Southview may seek compensation for the alleged taking.

4. The Eleventh Amendment precludes federal court jurisdiction over Southview's claim.

ARGUMENT

To persuade this Court to grant certiorari, Southview argues that the "decision of the Court of Appeals is in conflict with the decisions of this Court. . . . " Pet. 9. *See*

Rule 10.1(c). Southview premises this argument on three fallacies: first, that it has been deprived of its "fundamental right to exclude . . . deer from its property;" Pet. 9; second, that 44 acres of its land has been taken, "in perpetuity, for the benefit of the State's deer herd;" *id.*;[1] and, third, that Vermont law does not provide an adequate procedure for obtaining compensation for such a taking. *Id.* at 10.

Upon exposing each fallacy, it becomes clear that the Court of Appeals acted in full conformity with this Court's decisions relating to the issues raised by Southview.

I. SOUTHVIEW HAS NOT LOST ANY FUNDAMENTAL RIGHT

A. The Respondents have not deprived Southview of its "fundamental right" to exclude deer from its property.

Southview states that "this case arises out of Respondents' deprivation of Petitioners' fundamental right to exclude . . . deer from its property. . . . " Pet. 9. But this case simply involves the denial of a permit for a particular project.

Southview applied for a permit pursuant to Vt. Stat. Ann. Tit. 10, Ch. 151 ("Act 250") to build 33 houses on 88 acres of land which it owned in Stratton, Vermont. Pet.

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[1] Southview's Petition also mischaracterizes the nature of this matter and inaccurately portrays the Second Circuit's opinion, asserting that it condones a taking by the State of Vermont in violation of Southview's property rights.

App. D4, F8-F9. The Vermont Environmental Board, applying statutory criteria, denied a permit for the proposed project because it would imperil or destroy a "necessary wildlife habitat," namely a deeryard. Vt. Stat. Ann. tit. 10, §6086(a)(8)(A) (1969). Pet. App. D8-D14; F10, ¶37. The Vermont Supreme Court affirmed the Environmental Board's decision. *In re Southview Associates,* 153 Vt. 171, 569 A.2d 501 (1989).

Even if the "right to exclude deer" were to be considered a "fundamental right," the Board's permit denial did not cause deer to "invade" or "physically occupy" Southview's land. Nothing in the Board's decision requires Southview to submit to the presence of deer on its property "in perpetuity." Nor does its decision, or any other provision of Vermont law, prohibit Southview from excluding deer from its land. Southview can fence its land. Pet. App. A19. Southview's owners can hunt the deer. *Id.* Southview can, (and, indeed, recently *did*) log the deeryard,[2] *id.;* Vt. Stat. Ann. Tit. 10, §6001(3) (1969), thereby causing the deer to leave the land. In short, Southview's assertion that the Respondents have infringed upon Southview's purported "right to exclude" is not true.

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[2] Of course, if logging or constructing a fence is the prelude to an Act 250 "development," or "subdivision," Vt. Stat. Ann. Tit. 10, § 6001(3), (19) (1969), then a permit is required.

B. The decision of the Court of Appeals does not divest Southview of any "fundamental right."

Southview argues that the Court of Appeals' decision "established, as its rule of law," that landowners "must be prepared to surrender their property rights for the privilege of seeking a land use permit." Pet. 11-12. But again, the decision states no such thing. Judge Oakes merely reasons that Southview's application for a permit places this case, if anywhere, into the category of a possible "regulatory" takings claim.[3] Pet. App. A16-A21. Southview's argument that the Second Circuit somehow tramples its rights under hoof by imposing a draconian requirement for those who wish to apply for permits is unfounded, if not misleading.

Further, despite Southview's assertion that the Court of Appeals condones substantive due process violations and a taking by the Respondents, Pet. 15-22, it is evident that the Second Circuit never reaches these contentions. Rather, the decision of the Court of Appeals is a simple one: this case involves allegations of a "regulatory taking," Pet. App. A21, which, under the two-part test in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), are not yet ripe for review. Pet.

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[3] In this regard, Southview misinterprets Judge Oakes' mention of *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992). Pet. 12-14. Even a cursory reading of the decision indicates that Judge Oakes notes *Yee* merely to complement his analysis that, under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this case does not involve a "physical occupation" taking. Pet. App. A16-A21.

App. A21-A32.[4] In so holding, the Second Circuit follows an unbroken line of authority from this Court on the matter of ripeness in regulatory takings cases. Southview does not argue to the contrary.

The imaginary holdings conjured in Southview's Petition might conflict with takings decisions of this Court. The decision of the Court of Appeals does not. Southview's argument that "[t]he decision of the Court of Appeals does such violence to settled law, as expressed in precedent decisions of this Court," Pet. 11-12, is wholly without merit.

C. This matter involves only allegations of a "regulatory" taking, not a "physical occupation" taking.

As it did before the District Court and the Court of Appeals, Southview seeks to avoid settled ripeness standards by mischaracterizing its Complaint as one involving a "physical occupation" of its property. Pet. 11. Southview has not pled – nor could it – that the Respondents have authorized any occupancy, however slight, of the Southview property. Nor can Southview allege – as in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) – that the Respondents have conditioned permit approval on the grant of an easement to authorize *persons* "to pass to and fro," *id.* at 832, over Southview's property.

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[4] To the extent that Southview also raises substantive due process claims, the Court of Appeals finds that these interests are also subject to the *Williamson* requirements. Pet. App. A23-A25.

Instead, Southview advances a theory (which may be charitably described as "novel") that it has a ripe takings claim because the Respondents have required it "to submit to the permanent physical occupation of [its] property by the *deer*. . . . "[5] Pet. 16 (emphasis added). Even if Southview's argument could be supported by a plausible reading of takings jurisprudence, its assertion is without foundation within the confines of its own pleadings.

Southview affirmatively pleads that there were deer on its property prior to its submission of an Act 250 permit application. Pet. App. F17, ¶74. Southview pleads that "the State has no duty to control the movements of wildlife," Pet. App. F13, ¶53. Southview also pleads that Vermont property owners "are permitted to exclude deer from their properties," Pet. App. F19, ¶83, and, indeed, may in some instances secure state funding for fences. *Id.*, ¶85. It is upon these pleadings[6] and its theory of takings

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[5] The absurdity of Southview's "physical occupation" claim must be considered in light of its logical extension: were this case to be determined to be a "physical occupation," then all cases involving regulatory restrictions on land would be "physical occupations;" there would be no need for the distinction – most recently recognized in *Yee* – between "physical occupation" and "regulatory" takings. All setback requirements in zoning ordinances would be "physical occupations" by trees, grass, insects and worms; the building height limitations imposed in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), would be "physical occupations" by air and birds; a rule that prohibited the draining of a wetland would be a "physical occupation" by water.

[6] Southview also alleges that it may presently enter upon and possess all of its land; it may "undertake forestry, orchard and/or other agricultural activities" Pet. App. F19, ¶85, "subdivide [its] property into fewer than ten lots," and that, in so

that Southview premises questions of law deserving of a grant of certiorari. The response of this Court to appellants' claim in *Yee* is equally appropriate here: "Put bluntly, no government has required any physical invasion of petitioners' property." 112 S.Ct. at 1528.

As much as Southview may strain to contrive a "physical occupation" claim, this matter involves land use regulation.[7]

II. NO TAKING HAS OCCURRED

Southview's second premise is that the Respondents have "accomplished a complete taking of 44 acres of Petitioners' property," Pet. 22, "in perpetuity, for the benefit of the State's deer herd." Pet. 9. But Southview's contentions are without foundation for three reasons.

First, this case involves the denial of Southview's solitary permit application to build a particular project. There may be many other projects that Southview may be able to construct under Act 250; indeed, as both the District Court, Pet. App. B6, and the Second Circuit note, Pet. App. A28, Southview remains free, and, indeed, was

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doing, it may dispose of its property without restriction or interference. Pet. App. F18, ¶81. Applying *Loretto*, the Court of Appeals holds that these allegations, along with the limitations on Act 250 jurisdiction, *see* Part II, *infra*, mean that Southview retains possession, control, and the value of its property and thus no "physical occupation" has occurred. Pet. App. A19-A20.

[7] In this regard, Southview's use of the phrase "go too far," Pet. 14, is telling, as this is language from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922), a *regulatory* takings case.

invited by the Respondents, Pet. App. D13, to propose the development of other portions of its 88 acre tract that would have a lesser impact on the deeryard. What Southview cannot do "is build the exact residential subdivision for which it sought an Act 250 permit." Pet. App. A45. Because other projects may be approved, Southview has not yet established that a taking has occurred. *See Penn Central.*

Second, as Judge Oakes notes, because Act 250 has limited jurisdiction, Southview is free to develop and use its entire parcel in ways that do not trigger Act 250 review. Pet. App. A45. Southview is free to put its property to a myriad of uses, many of which could provide substantial economic profit. *Id.*

Third, the section of Act 250 under which Southview's permit was denied is limited by a cost-benefit analysis. Vt. Stat. Ann. Tit. 10, §6086(a)(8)(A)(i) (1969); Pet. App. G1-G2. The Respondents determined that the:

> loss to the public from the destruction and imperilment of the habitat is not outweighed by the economic, social, cultural, recreational or other benefit from the project . . . The Board is not persuaded that the Applicant has thoroughly investigated the possibility of less intensive development in other areas of the site.

Pet. App. D11-D13. Other proposals may change this analysis; Southview can either reconfigure its plans to lessen the loss, or propose a project with greater "economic, social, cultural, recreational or other" benefits. Southview's assertion, therefore, that it has been

deprived of all economic use of its property is, quite simply, not true.[8]

III. SOUTHVIEW'S ARGUMENTS PERTAINING TO ADEQUATE MEANS FOR COMPENSATION DO NOT PROVIDE A BASIS FOR GRANTING CERTIORARI

Southview's final argument is that "neither Act 250 nor any other provision of Vermont law provides a reasonable, adequate and certain means for obtaining compensation for the taking of Petitioners' property." Pet. 23-29; *see Williamson*, 473 U.S. at 194. Despite this assertion, however, on November 30, 1992, Southview filed an action in state court seeking compensation for the alleged taking. *Southview Associates v. State of Vermont et al.*, No. S753-92 WnC (Vt., Wash. Sup. Ct.). The question of whether Vermont provides an adequate procedure for Southview to seek compensation is therefore presently pending before Vermont's courts. Southview cannot assert an inadequate remedy until its demand for compensation has been denied pursuant to a final order dispositive of this issue.[9]

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[8] This case is therefore not similar, in any fashion, to the recent decision in *Lucas v. South Carolina Coastal Comm'n*, 112 S.Ct. 2886 (1992), where the Court held that the plaintiff had lost all use of his property as result of the state's regulations.

[9] The Second Circuit's October 30, 1992 decision holds that Southview must first file "a suit in state court . . . before it asserts a section 1983 claim [in federal court] based on a regulatory taking." Pet. App. A32. Southview's recent state court filing effectively renders moot the Petition's claimed error with the

Southview also renews the argument raised to the Second Circuit that a provision for obtaining compensation is "reasonable, adequate and certain" only if it is established by *statute*. Pet. 24-26. The Court of Appeals rejected this limited reading of the *Williamson* requirement, deciding instead to follow the reasoning of the Ninth Circuit in *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-1 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988), the First Circuit in *Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506, 513-15 (1st Cir. 1987), and the Eighth Circuit in *Littlefield v. City of Afton*, 785 F.2d 596, 609 (8th Cir. 1986). *See* Pet. App. A30. There is thus no disagreement among the Circuits on this point.

Next, Southview argues that, "[w]hen the government has not provided an adequate *process* for obtaining compensation, that fact alone should lead to the conclusion that the property owner has been denied both Due Process and Just Compensation." Pet. 24 (emphasis in original). Before the Second Circuit, Southview argued only that the lack of such a remedy meant that it did not need to comply with *Williamson's* second ripeness requirement. *See* Pet. App. A29-A32. At no time did Southview ever argue below that Vermont's alleged failure to provide a process was itself a denial of "Due Process and Just Compensation." This Court generally adheres to the rule that it will not entertain issues that were not raised below. *Yee*, 112 S.Ct. at 1531. Southview

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Second Circuit's language which requires the use of state compensation remedies.

advances no reason why this rule should not be followed in this instance.[10]

Finally, Southview argues that the Vermont Supreme Court has determined that, "in the absence of a *specific statutory provision* for compensation, the remedy for a regulatory taking is to *strike down* the regulation." Pet. 27 (citing *Foster v. Stafford Nat'l Bank*, 57 Vt. 128, 5 A. 890 (1884); emphasis in original). This assertion is frivolous.[11] The century old *Foster* case was *not* a regulatory takings case. It was a case in which a state statute gave condemnation authority to a private corporation, but no provision was made for the corporation's payment for lands it condemned. Under those circumstances, the Court held the statute unconstitutional.

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[10] Nor does Southview point to any authority in support of its new argument. Indeed, even assuming that Vermont fails to provide a process by which compensation can be sought, the sole ramification of such a failure is that Southview does not have to satisfy the second ripeness test in *Williamson*. But to hold that such a failure of process, by itself, means that the Just Compensation clause is violated leads to the absurd result that a violation can be found without the necessity that a claimant first prove that a taking has occurred.

[11] Even if Southview's reading of Vermont case law were correct, then this would be yet another reason why Southview should go first to the state courts for relief: if the offending regulation is invalidated by the state courts, Southview will be allowed to construct its project as it pleases, and no taking will occur. Consequently, there will be no violation of the federal constitution, and recourse to the federal courts will be unnecessary.

In any event, Vermont law requires compensation[12] for a taking: "[W]henever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. Ch. I, art. 2; Pet. App. G8. What Southview characterizes as "the formidable task of developing a constitutional remedy each time the State effects a taking," Pet. 10, is, in reality, simply an action at common law. *Eno v. City of Burlington*, 125 Vt. 8, 16, 209 A.2d 499, 506 (1965) (common law provides the requisite machinery to secure full vindication of rights provided by the Vermont Constitution).

Southview's argument boils down to a contention that *it need not even try* to seek compensation through any non-statutory state process before asserting its rights under the Just Compensation clause. Ironically, it is Southview's argument that is contrary to settled precedent: because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. *Williamson*, 473 U.S. at 195.

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[12] There is no reason to believe that Vermont courts would not follow the general rule that equitable relief is not available where there is an adequate remedy at law. *See Campbell Inns, Inc. v. Banholzer*, 148 Vt. 1, 7, 527 A.2d 1142, 1146 (1987).

IV. FEDERAL COURT JURISDICTION IS BARRED BY THE ELEVENTH AMENDMENT

Even if a taking had occurred which was ripe for review, this case would be barred by the Eleventh Amendment.

While captioned as a suit against the "individual" members of the Vermont Environmental Board, Southview did not serve any individual defendants, nor have any individual defendants appeared in this matter. R. 2, 3. Rather, Southview served the Summonses and Complaints on Vermont's Deputy Attorney General.[13] R. 2; F.R.Civ.P. 4(d)(6); Vt.R.Civ.P. 4(d)(2). Service was acknowledged and appearances were made on behalf of the defendants in their official capacities only. R. 2, 3. No further service was attempted or perfected.

An action against members of the Environmental Board in their official capacities "is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham,* 473 U.S. 159, 166 (1985). To sustain an official capacity suit, a plaintiff must overcome those "forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.* at 167. *See also, Hafer v. Melo,* 112 S.Ct. 358, 361-62 (1991).

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[13] Southview named the *current* members of the Environmental Board as defendants. Only *three* of the eight named defendants participated in the Board's denial of Southview's permit application. *Compare* Pet. App. D14 with Pet. App. A1. There is thus no basis in fact or law to sue all current members of the Board in their individual capacities.

The Eleventh Amendment limits federal jurisdiction over official capacity suits to a grant of prospective injunctive relief. *Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651, 665 (1974); *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 105-106 (1984). Declaratory relief cannot issue unless it is accompanied by a grant of prospective injunctive relief. *Green v. Mansour*, 474 U.S. 64 (1985).

Southview's request for injunctive relief is limited to its prayer that the Board be enjoined "from denying the permit and applying Act 250 in the unconstitutional fashion which it has." Pet. App. F23. As Southview clearly alleged, *the permit has already been denied.* Pet. App. F10, ¶36. Any such injunctive relief would be retroactive. Southview is not seeking prospective injunctive relief.

Furthermore, Southview attempts a grievous circumvention of the Eleventh Amendment by demanding declaratory and injunctive relief rather than compensation, Pet. App. F23, for an alleged taking. A state may reconcile its actions with the takings clause of the Fifth Amendment by either not taking land for public purposes *or* providing just compensation for such a taking. *See Williamson*, 473 U.S. at 195. If Vermont's administration of Act 250 results in a taking, Vermont may choose to pay just compensation. Or, Vermont may choose to limit Act 250 so as to never cause a taking. Either choice conforms to the Fifth Amendment. *Id.*

The authority to make such a choice is vested exclusively with the State of Vermont. Vermont retains the sovereign right to legislate, interpret and administer its own laws. *See Pennhurst*, 465 U.S. at 106: "[I]t is difficult

to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment."

Southview's requested injunctive and declaratory relief, if granted, would eliminate the alleged taking without allowing Vermont the opportunity to provide just compensation. Thus, despite the absence of an infirmity under the takings clause of the Fifth Amendment, a federal court would deny Vermont its prerogative to choose the application of Act 250 which best suits its needs. It would establish an interpretation of Act 250 contrary to that enunciated by Vermont's Supreme Court in *In re Southview Associates* and instruct the state to comply with that interpretation.

Such federal interference with the interpretation and administration of Vermont laws is precisely what the *Pennhurst* Court found offensive to the Eleventh Amendment and principles of federalism. Jurisdiction over this matter, insofar as Southview alleges a taking, is thus barred by the Eleventh Amendment.

CONCLUSION

The Respondents respectfully request that the Petition for Certiorari be denied.

State of Vermont

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